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Tan Sri Eric Chia Eng Hock v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–09–27 OF 2005

B DENIS ONG, ABDUL AZIZ MOHAMAD AND AZMEL JJCA

20 APRIL 2006

Criminal Procedure — Revision — Revisionary power of High Court — Revision on
C *admission of foreign evidence at stage when trial was still in progress — Whether revision must be used sparingly only in cases where glaring patent errors were committed by the lower courts — Criminal Procedure Code s 323*

Evidence — Taking of evidence — Foreign proceedings — Whether foreign evidence must
D *fulfill conditions under s 33 of Evidence Act 1950 before they could be admitted in local trial — Whether foreign evidence inadmissible because there was no proof of unreasonable delay or expense to procure witnesses — Mutual Assistance In Criminal Matters Act 2002 s 8 — Evidence Act 1950 s 33*

E

The learned sessions court judge had rejected the Public Prosecutor's application for the admission as evidence under sub-s (3) of s 8 of the Mutual Assistance In Criminal Matters Act 2002 ('the MACMA') of certain evidence taken in Hong Kong by a Magistrate of Hong Kong pursuant to the Attorney General's request under sub-s (1)
F of that section, which the Attorney General was satisfied would be relevant to the trial of the appellant. The evidence consisted essentially of the transcripts of the evidence of six witnesses and of documents produced by one of the witnesses. The sessions court had ruled that s 33 of the Evidence Act 1950 applied to the Hong Kong evidence and that the preconditions for admissibility laid down in the section had not been fulfilled.

G

On the application of the Attorney General to the High Court, the learned judge, after hearing submissions from both sides, exercised his powers of revision under s 323 of the Criminal Procedure Code ('the CPC') and ordered that the evidence taken in Hong Kong be admitted as evidence in the trial of the appellant. The High Court held that s 33 of the Evidence Act 1950 ('the EA') did not apply to the Hong
H Kong evidence.

The appellant, contending that the section applied to the Hong Kong evidence, submitted that it was not admissible because there was no proof that the presence of the witnesses concerned 'cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers reasonable'.

I

A preliminary point was raised about the judge's jurisdiction to entertain the Public Prosecutor's application for revision. The appellant submitted that the powers of revision under s 323 of the CPC 'are to be used sparingly only in cases where glaring patent errors are committed by the Lower Courts'.

There were two issues of law, ie: (1) whether s 33 of the EA apply to the Hong Kong evidence; and (2) whether criminal revision was an appropriate procedure to deal with a ruling by the trial court on issue (1) at this stage of the trial which was still in progress.

Held:

(1) (per **Abdul Aziz Mohamed JCA**, **Azmel JCA** concurring) The scheme of s 8 of the MACMA is entirely different from the scheme of s 33 of the EA. Therefore any requirement for the admission of evidence under s 33 belongs exclusively to the scheme of s 33 and cannot extend so as to be a part of the scheme of s 8 (see para 77).

(2) (per **Abdul Aziz Mohamed JCA**, **Azmel JCA** concurring) Section 8 of the MACMA provides a scheme for the deliberate gathering in a foreign State of the testimonies of witnesses to be used specifically in particular criminal proceedings in Malaysia, something which is clearly not within the contemplation of s 33. If s 33 applies to evidence taken under s 8, the evidence taken would not be admissible because one of the requirements for admissibility under s 33 is the right and opportunity to cross-examine, and that would conflict with sub-s (4) and frustrate the intention behind it (para 77). Thus the sessions court had made a glaring patent error in rejecting the Hong Kong evidence and that therefore the High Court was right to act under s 323 (para 82).

(3) (per **Denis Ong JCA** dissenting) Section 33 is a provision of EA. As earlier stated, it has no application to deposition obtained abroad which, by s 2, falls outside the scope of the EA. However, s 33 is rendered applicable to such deposition by way of application that is to say, via the first provision and the second provision of s 8(3) thereby treating such deposition on an equal footing as a deposition obtained locally within Malaysia and subject to the same principles of admissibility set out in s 33, and not as a special law as the DPP submitted (para 58).

(4) (per **Denis Ong JCA** dissenting) Section 8(3) and s 33 can be read in harmony and should be so read. So read, they are intelligible, meaningful and workable and should be allowed to work together as all three Acts namely, the MACMA, the EA and CPC are Acts passed by Parliament. The phrase 'subject to the provisions of the Evidence Act (Act 56) and the Criminal Procedure Code (Act 593)' in s 8(3) is not superfluous and is not to be ignored (para 65).

(5) (per **Denis Ong JCA** dissenting) The learned trial judge was duty bound to rule the Hong Kong evidence in or out as the case may be, which he has done so with reasons. Such a ruling is procedural in nature and is not final. It was open to him to reconsider his ruling at any time and parties thereto had no right of appeal against such ruling while the trial was still in progress. For the same reason, criminal revision was premature and inappropriate at this juncture. For now, parties must abide by the ruling of the court. As it stood,

there was nothing seriously amiss with the ruling. Even if there were, it was open to the aggrieved party to appeal to the High Court once judgment had been pronounced in open court below on the case as a whole (see para 68).

[Bahasa Malaysia summary

Hakim mahkamah sesyen yang bijaksana telah menolak permohonan Pendakwa Raya untuk kemasukan sebagai keterangan di bawah sub-s (3) kepada s 8 Akta Bantuan Bersama Dalam Perkara Jenayah 2002 ('MACMA') beberapa keterangan yang dikemukakan di Hong Kong oleh Majistret Hong Kong menurut permintaan Peguam Negara di bawah sub-s (1) kepada seksyen tersebut, yang mana Peguam Negara berpuas hati adalah relevan kepada perbicaraan perayu. Keterangan tersebut mengandungi khususnya transkripsi keterangan enam orang saksi dan dokumen-dokumen yang telah dikemukakan oleh salah seorang daripada saksi tersebut. Mahkamah sesyen memerintahkan bahawa s 33 Akta Keterangan 1950 digunakan kepada keterangan Hong Kong dan bahawa pra syarat untuk kebolehterimaan yang dibentangkan dalam seksyen tersebut tidak dipenuhi.

Atas permohonan Peguam Negara ke Mahkamah Tinggi, hakim yang bijaksana setelah mendengar hujah kedua-dua pihak, menggunakan kuasa semakan beliau di bawah s 323 Kanun Tatacara Jenayah ('KTJ') dan memerintahkan agar keterangan yang dikemukakan di Hong Kong diterima sebagai keterangan dalam perbicaraan perayu. Mahkamah Tinggi memutuskan bahawa s 33 Akta Keterangan 1950 ('AK') tidak digunakan kepada keterangan Hong Kong itu.

Perayu, menegaskan yang seksyen tersebut terpakai kepada keterangan Hong Kong, berhujah bahawa ia tidak boleh diterima kerana tiada bukti yang kewujudan saksi-saksi berkaitan 'cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers reasonable'.

Satu perkara penting telah ditimbulkan tentang bidang kuasa hakim untuk melayan permohonan Pendakwa Raya untuk semakan. Perayu berhujah bahawa kuasa-kuasa semakan di bawah s 323 KTJ 'are to be used sparingly only in cases where glaring patent errors are committed by the Lower Courts'.

Terdapat dua persoalan undang-undang, iaitu: (1) sama ada s 33 AK terpakai kepada keterangan Hong Kong; dan (2) sama ada semakan jenayah adalah prosedur yang sesuai digunakan untuk keputusan oleh mahkamah perbicaraan berhubung persoalan (1) di peringkat perbicaraan ini yang masih berlangsung.

Diputuskan:

(1) (oleh **Abdul Aziz Mohamed HMR**, **Azmel HMR** bersetuju) Skim s 8 MACMA berbeza dengan skim s 33 AK. Oleh itu apa-apa keperluan untuk kebolehterimaan keterangan di bawah s 33 dimiliki secara eksklusif kepada skim s 33 dan tidak boleh dilanjutkan sehingga menjadi sebahagian daripada skim s 8 (lihat perenggan 77).

(2) (oleh **Abdul Aziz Mohamed HMR**, **Azmel HMR** bersetuju) Seksyen 8 MACMA memperuntukkan satu skim untuk pertemuan dalam Negara asing keterangan-keterangan saksi-saksi yang digunakan khususnya dalam prosiding jenayah di Malaysia, suatu yang jelas bukan dalam maksud s 33. Jika s 33 menggunakan keterangan terdapat di bawah s 8, keterangan yang diambil tidak boleh diterima kerana salah satu keperluan untuk kebolehterimaan di bawah s 33 adalah hak dan peluang untuk memeriksa balas, dan itu akan bercanggah dengan sub-s (4) dan mengecewakan niat di sebaliknya (lihat perenggan 77). Oleh itu mahkamah sesyen membuat kesilapan besar dengan menolak keterangan Hong Kong itu dan oleh itu Mahkamah Tinggi adalah betul untuk bertindak di bawah s 323 (lihat perenggan 82).

(3) (oleh **Denis Ong HMR** menentang) Seksyen 33 adalah satu peruntukan AK. Seperti yang dikatakan sebelum ini, ia tidak terpakai untuk deposisi yang diperoleh di seberang yang, berdasarkan s 2, di luar skop AK. Bagaimanapun, s 33 boleh dikatakan terpakai untuk deposisi melalui permohonan iaitu, melalui peruntukan pertama dan peruntukan kedua s 8(3) dan oleh itu deposisi sedemikian boleh dianggap sama taraf sebagai deposisi yang diperoleh di Malaysia dan tertakluk kepada prinsip-prinsip kebolehterimaan yang sama dinyatakan dalam s 33, dan bukan sebagai undang-undang khas seperti yang dihujahkan oleh Timbalan Pendakwa Raya (lihat perenggan 58).

(4) (oleh **Denis Ong HMR** menentang) Seksyen 8(3) dan s 33 boleh dibaca bersama. Kedua-duanya boleh difahami, mempunyai maksud dan boleh dicapai dan patut dibenarkan berfungsi bersama kerana ketiga-tiga Akta tersebut iaitu, MACMA, AK dan KTJ adalah Akta-Akta yang diluluskan oleh Parlimen. Ungkapan 'subject to the provisions of the Evidence Act (Act 56) and the Criminal Procedure Code (Act 593)' dalam s 8(3) bukan suatu yang tidak diperlukan dan tidak patut diketepikan (lihat perenggan 65).

(5) (oleh **Denis Ong HMR** menentang) Hakim perbicaraan yang bijaksana terikat dengan kewajipan untuk memutuskan keterangan Hong Kong itu masuk atau tidak mengikut kepada kes, yang mana beliau telah lakukan dengan alas an-alasan. Keputusan sedemikian bersifat prosedural dan bukan muktamad. Adalah terbuka kepada beliau untuk menimbang semula keputusannya pada bila-bila masa semasa perbicaraan masih berjalan. Untuk sebab yang sama, semakan jenayah adalah pra matang dan tidak sesuai pada peringkat ini. Buat masa ini, pihak-pihak hendaklah mematuhi keputusan mahkamah. Oleh itu, tiada apa-apa yang kurang dengan keputusan tersebut. Jikapun ada, ia adalah terbuka kepada pihak yang terkilan untuk merayu ke Mahkamah Tinggi setelah penghakiman disampaikan di mahkamah terbuka berhubung kes secara keseluruhannya (lihat perenggan 68).]

Notes

For cases on foreign proceedings, see 7(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2427–2428.

For cases on revisionary power of High Court, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2998–3015.

Cases referred to

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169 (refd)

Cheah Boon Tat v PP [1995] 2 MLJ 612 (refd)
Clark (C & J) Ltd v IRC [1973] 1 WLR 905 (refd) (refd)
Crown Solicitor v Kitingan [1995] 1 LRC 634 (refd)
Dato' Yap Peng v P [1993] 1 MLJ 337 (refd)
Ex p Kirby [1979] 1 WLR 541 (refd)
Finance Facilities Pty Ltd v Federal Commissioner of Taxation [1970-1971] 127 CLR 106 (refd)
Gleeson, Re [1907] VLR 368 (refd)
Kee Siak Kooi Anor v Regina [1955] 2 MLJ 57 (refd)
Oskar v Government of Australia [1988] 87 Cr App R 299 (refd)
PP v Chew Siew Luan [1982] 1 MLJ 280 (refd)
PP v Chu Beow Hin [1982] 1 MJ 135 (refd)
Quazi v Quazi [1979] 3 All ER 897 (refd)
Quazi v Quazi [1980] AC 744 (refd)
R v Secretary of State for the Home Department; ex p Zardari (Unreported) CO 0345/98 11 March 1998 QBD) (refd)
Set Kon Kim v Officer in Charge, Cheras Police Station [1984] 1 MLJ 73 (refd)

Legislation referred to

Anti-Money Laundering Act 2001 s 73
Criminal Procedure Code ss 2, 267, 272A, 323, 399, 399A, 424
Evidence Act 1950 ss 32, 33, 34, 60(1), (3), 90A, 118
Evidence Ordinance (Cap 8) [Hong Kong] s 77F(1)(a), (b), (c), (d)
Mutual Assistance In Criminal Matters Act 2002 ss 2(1), 3(a), (b), 4(3), 5, 7, 8(1), (2), (3), (4), 9, 13, 14, 15, 17, 18, 20, 22, 23, 27, 31, 35, 37, 39, 40, 42(1), (2), 43, 44
Mutual Legal Assistance In Criminal Matters Ordinance (Chapter 525) [Hong Kong] s 10(2)
Penal Code s 409

Appeal from: Criminal Revision No 43–11 of 2005 (High Court, Kuala Lumpur)

Muhamad Shafee Abdullah (Frida Krishnan, Amy Chong Boon Chin and Sarah Abishegam & SP Pathi with him) (Shafee & Co) for the appellant/accused.
Mohd Yusof bin Hj Zainal Abidin DPP (Nordin Hassan and Tun Abdul Majid DPP with him) for respondent.

Denis Ong JCA (delivering dissenting judgment):

INTRODUCTION

[1] This is an appeal by Tan Sri Eric Chia ('the appellant') to this court against the decision dated 29 April 2005 of the High Court in Kuala Lumpur sitting in criminal

revision of a decision dated 26 April 2005 of the Sessions Court in Kuala Lumpur pertaining to the admissibility of certain evidence which has arisen in the course of a criminal trial in progress in that court but is presently adjourned.

FACTS AND BACKGROUND

[2] The appellant is charged and tried in the Sessions Court in Kuala Lumpur with criminal breach of trust by an agent of an aggregate sum of RM76.4m, an offence punishable under s 409 of the Penal Code ('FMS Cap 45').

[3] The trial is ongoing in Kuala Lumpur but has been adjourned on 16 August 2004 to make way for the examination of six prosecution witnesses by the Magistrate's Court in Hong Kong in response to a letter of request from Malaysia through the Federal Attorney-General to the Hong Kong Government pursuant to the provisions of ss 7 and 8(1) and (2) of the Mutual Assistance In Criminal Matters Act 2002 ('Act 621').

[4] The examination of these witnesses in fact took place on 25 and 26 August 2004 in the Magistrate's Court, Hong Kong in Magistrate's Court at Eastern Miscellaneous Proceedings No 2057 of 2004 before the Magistrate Mr David Thomas in the presence of the Federal Attorney General and Dato' Muhamad Shafee Abdullah, learned counsel for the appellant. The appellant himself was not present at the examination in Hong Kong.

[5] At the resumption of the trial in Kuala Lumpur subsequently, and as part of its case against the appellant, the prosecution sought under s 8(3) of Act 621 to have admitted by the sessions court as evidence, certified transcripts of audio recording of the proceedings of these witnesses examined in Hong Kong and the documents produced in such proceeding. The certificate, transcripts and documents were provisionally marked for identification as:

ID 156 — the certificate of the magistrate;

ID 157 — the transcripts of witnesses' evidence; and

ID 158 — the documents produced in the proceeding.

[6] The appellant challenged the admissibility of the transcripts as evidence and on 27 April 2005, the sessions court disallowed the application of the prosecution. By a letter dated 26 April 2005, addressed to the judge, High Court Kuala Lumpur through the senior assistant registrar, the prosecution requested for a criminal revision of the decision of the sessions court which it maintained was contrary to the provisions of the law.

[7] On 28 April 2005, the High Court sat and heard both the deputy public prosecutor and counsel for the appellant and on 29 April 2005 made a revisionary

order that the evidence recorded in Hong Kong provisionally marked as ID 156, ID 157 and ID 158 be admitted in the full trial in the sessions court and to be marked as prosecution exhibits.

[8] Against the whole decision of the High Court, the appellant appealed to this court.

IN THE SESSIONS COURT

[9] The questions of law canvassed at first instance were whether ID 156, ID 157 and ID 158 were admissible:

(a) under s 8(3) of Act 621 as the prosecution contended;

(b) under s 33 of the Evidence Act 1950 (Act 56) as the appellant maintained;

(c) under the provisions ss 267 and 272A of the Criminal Procedure Code (FMS Cap 6) with particular reference to ID 157; and

(d) under s 90A of Act 56 read with s 42 of Act 621 in respect of ID 156 and ID 158.

[10] On (a) it found in favour of the prosecution that the request by the Federal Attorney-General and the receipt by him of ID 156, ID 157 and ID 158 under ss 7 and 8 of Act 621 were legal and proper. It did not accept the submission of the prosecution that Act 621 as a special law overrode the provisions of Act 56 on the admissibility of evidence in the event of conflict for the simple reason that there was no such conflict and that the words in parenthesis 'subject to the provisions of the Evidence Act 1950 (Act 56)…' in s 8(3) of Act 621 answered that point explicitly. It ruled as a matter of law in favour of the appellant that s 33 of Act 56 was applicable to the admissibility or otherwise of ID 156, ID 157 and ID 158 on the ground that its provisions were wide enough to encompass evidence recorded in a foreign country although its drafters could not have envisaged its use for evidence so recorded, preferring to adopt a more harmonious interpretation of ss. 7, 8 and 9 of Act 621 with s 33 of Act 56, to the construction contended by the prosecution. And following Quazi v. Quazi [1980] AC 744 (HL) it was of the opinion that the proceeding in Hong Kong was a judicial proceeding within the meaning of that term in s 33 but ruled that ID 156, ID 157 and ID 158 could not be tendered as evidence at the trial because the preconditions stipulated in s 33 had not been fulfilled by the prosecution.

[11] On (b), it ruled that ID 157 was inadmissible to form part of the record of the trial court because it was recorded without compliance with express provisions of ss 267 and 272A of FMS Cap 6 being:

(i) recorded not in the handwriting of the trial judge but by a Magistrate in Hong Kong without his authorisation; and

(ii) ID 157 was disjointed and found it difficult to make sense out of most of it.

[12] On (c), it was of the opinion that ID 156 and ID 158 were inadmissible in evidence under s 42 of Act 621 read with s 90A of Act 56 in the ongoing trial because they were not duly authenticated to comply with the strict requirements of s 42(2) in that:

(i) only some, but not all, of the documents in ID 158 were actually original documents in accord with the primary evidence rule;

(ii) no certificate, signed by the person responsible for the management of the operation of or the conduct of the activities of the actual computer used as required by s 90A(2) of Act 56, accompanied ID 158; and,

(iii) ID 156 was a blanket certification by the Magistrate in Hong Kong for all the documents in ID 158 instead of separate certificates to be issued to identify and mark each separate document in ID 158 as envisaged in s 42(2) of Act 621. Neither was the transcript record helpful to the trial court in deciphering the documents purportedly verified.

IN THE HIGH COURT

[13] Two issues of law were canvassed at the revisionary hearing:

(a) whether ID 156, ID 157 and ID 158 were admissible under s 33 of Act 56 or s 8(3) of Act 621; and

(b) whether criminal revision was an appropriate procedure to deal with a ruling by the trial court on issue (a) at this stage of the trial which was still in progress.

[14] The matter in (b) was raised by way of a preliminary point of law by counsel for the appellant at the outset of the revisionary hearing. And the High Court dealt with this matter first in its grounds of judgment holding that it was obliged to act under s 323 of FMS Cap 6 where, as in the present case, there was misconception of the law by the subordinate court which had resulted in a miscarriage of justice to the respondent.

[15] On the matter in (a), the High Court judge held that ID 156, ID 157 and ID 158 were admissible under s 8 of Act 621 and that s 33 of Act 56 was not applicable. Thus it made an order in revision in the following terms:

(i) that ID 156, ID 157 and ID 158 (the Hong Kong evidence) be made admissible and be marked as an exhibit for the prosecution;

(ii) that the question of the veracity and weight of that Hong Kong evidence be determined by the learned trial judge at a later stage of the proceedings (as is allowed under the guidelines provided by s 8(4) of Act 621.

[16] The reasons for the holding of the court on these two issues appear from pp 50–56 of Vol 1 of the appeal record, which reasons are reproduced hereafter for easy reference:

Admissibility of the Hong Kong evidence

The Hong Kong evidence was taken in a proceeding by a magistrate in Hong Kong. It was recorded pursuant to the request of the Attorney General of Malaysia under s 8(1) of MACMA. Under that section, once the Attorney General is satisfied that such evidence is relevant it may pursue to gather such evidence. The effect of this section is similar to evidence taken out of jurisdiction for use in a civil proceeding under O 39 r 2 of the Rules of the High Court 1980. In *AG of Malaysia v Gapari Kitingan* [1990] 3 MLJ 307, Haidar J held that this O 39 r 2 procedure could even be made applicable to criminal proceedings with the necessary variations made to the request, even without the necessity of attempting to procure those overseas witnesses to attend and give evidence in the Malaysian court. Once that evidence is tendered before the trial court it may be admitted under s 8(3) of the MACMA, which states:

> (3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence at any criminal proceedings to which the request relates.

Learned counsel for the accused fervently argued that the qualification 'subject to the Evidence Act' stated in that section must mean that it has to come within the regime of s 33 Evidence Act 1950, which states that:

> Relevancy of certain evidence for proving in subsequent proceeding the truth of facts therein stated
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> Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:
>
> Provided that —
>
> (a) the proceeding was between the same parties or their representatives in interest;
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;
>
> (c) the questions in issue were substantially the same in the first as in the second proceeding.

In short, if the conditions stated in the proviso of s 33 are met, evidence given in a previous judicial proceeding becomes relevant in a subsequent trial to prove that fact stated when that witness is, inter alia, dead or cannot be produced without considerable delay or expense.

Learned counsel argued that the situation in this case is actually reversed in that in obtaining the Hong Kong evidence much money and time was unnecessarily spent and that the prosecution had not even attempted at procuring those witnesses in Hong Kong to testify in Malaysia, which the Attorney General could request for under s 9 of MACMA.

In my view, s 33 of the Evidence Act has no application here. Firstly the proceeding before the magistrate in Hong Kong is not a previous judicial proceeding envisaged under that

section. More importantly, the consideration for relevancy of evidence under s 33 does not, in my view, govern this aspect of the evidence under s 8(1) of MACMA. The latter section allows for off-shore evidence taking upon his subjective satisfaction that such evidence, as in the Hong Kong evidence here, would be relevant in any criminal proceedings within Malaysia, such as the ongoing trial now of the accused person. It does not require to pass the test and qualifications laid down in s 33 of the Evidence Act.

MACMA, as the name suggests is a specific piece of legislation to facilitate mutual assistance in criminal matters. It is extra territorial in scope and being a law that transcends national boundary, it has to be read as special in its effect. In my view, public policy demands that it be given a wider latitude and not be shackled by the dictates of technicalities found under the Evidence Act 1950, notwithstanding its mention in s 8(3). The reception of evidence recorded pursuant to s 8(1) of MACMA should not therefore be hampered by the requirements of the Evidence Act. In my view, this special law should be allowed to operate to its maximum efficacy. To subject its operation to the technical requirements as found under s 33 of the Evidence Act would render Parliament's intention of a speedy and convenient method of evidence taking overseas, as nugatory.

Even if assuming that s 33 of the Evidence Act 1950 applies, I would still hold that MACMA, as a special legislation must be deemed to override that provision. In *Goodwin v Phillips* (7, CLR 1, 14) it was said:

> The conflict between the two sections is one of the kinds to which Sir George Jessel MR refers in *Taylor v Oldham Corporation*. Where there is general provision which, if applied in its entirety, would neutralize a special provision dealing with the same subject-matter, the special provision must be read as a proviso to the general provision, and the general provision, must be deemed not to apply.

A commentary in N.S. Bindra's Interpretation of Statutes 1997, p. 510, makes the following observation, in an apparent conflict situation:

> Conflict between general Acts and special statutes
>
> In case of statutes on same subject the rule of construction is to so interpret the enactments that they shall be if possible consistent. But if they cannot be fairly read in such a way to give full meaning to each consistently with the other, then one must give way, and the one to give way will be the general provision. *In such a case the later special Act will be taken to have amended the earlier general Act in so far as the matters dealt with in the specific Act are concerned.* The Court, however, will assume that the Legislature, in enacting the sections as separate provisions of the same statute or groups of statutes intended full effect to be given to each. It is only when there becomes apparent an inconsistency which it is impossible to avoid by any reasonable interpretation of the words used, that a court will in general draw the conclusion that the Legislature intended that later special statute to repeal the earlier general statute. (Emphasis added.)

It is unfortunate that our Evidence Act 1950 was not consequently amended to cater for evidence taken under MACMA such as the one found under s 77F of the Hong Kong Evidence Ordinance, Chapter 8 which states:

> Admissibility in criminal proceedings of evidence obtained pursuant to letter of request:
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> Subject to this section and section 77G, any deposition, together with any document or thing exhibited or annexed thereto, which is received by the Registrar pursuant to a letter

of request issued by him under section 77E in respect of any criminal proceedings, *shall on its production without further proof be admitted in those criminal proceedings as prima facie evidence of any fact stated* in the deposition and in the document (if any) exhibited or annexed thereto… (Emphasis added.)

The learned deputy public prosecutor has submitted that the phrase 'subject to the Evidence Act 1950' should be confined to those parts of the Evidence Act 1950 on the relevancy of facts, in particular ss 6–16. This too could not be a correct interpretation because it would have been so stated in the law if it was meant to be that. It may also well be that that phrase is in anticipation of an amendment to the Evidence Act 1950. Be that as it may, it is my view that MACMA should be read with a degree of liberty so that its objective is met.

For these reasons, I would allow for a revision on the learned Session Court Judge's ruling on this issue and make an order that:

(i) The Hong Kong evidence be made admissible and be marked as an exhibit for the prosecution.

(ii) The question of veracity and weight of that Hong Kong evidence be determined by the learned trial judge at a later stage of the proceedings (as is allowed under the guidelines provided by s 8(4) of MACMA.

IN THE COURT OF APPEAL

[17] The same two issues of law in the High Court, already mentioned above, were argued before us, and like in the High Court, except for a brief reference to, there was no scrutiny or a detailed discussion of the Hong Kong evidence at the hearing before us. In short, the submissions and arguments of counsel were essentially on a matter of law

SUBMISSION OF COUNSEL FOR APPELLANT

[18] On the issue of law in (a) above, learned counsel for the appellant submitted that:

(a) both s 33 and s 8(3) were applicable to the Hong Kong evidence; and

(b) these sections must be read in harmony.

On Submission (a)

He identified that s 33 was the only route through which the public prosecutor could have the record of proceeding in Hong Kong admitted by the trial court but emphasised that the various documents (ID 158) must be proved by the Prosecution at the trial. On s 33 itself, he makes the following points:

— that it concerns admissibility of evidence;

— that 'judicial proceeding' in s 33 has the same meaning defined in s 2 of FMS Cap 6;

— that the 1st holding of the court in the headnote to *Quazi v Quazi* [1979] 3 All ER 897 is applicable;

— that the proceeding in Hong Kong is a 'judicial proceeding' and a separate one; and,

— that before the record of proceedings in Hong Kong and ID 158 could be admitted and used in the trial court, the conditions and prerequisites of s 33 must be satisfied - all the limbs of s 33 must be satisfied:*Dato' Yap Peng v Public Prosecutor* [1993] 1 MLJ 337 (HC) at p 349.

On s 8 of Act 621, counsel makes the following points:

— that it is not an exception to the hearsay rule and in fact is not an evidential provision; exceptions to hearsay are enacted, eg ss 32, 33 and 34 of Act 56, ss 399, 399A of FMS Cap 6, and the Banker's Book (Evidence) Act 1949 (Act 33/71);

— that it is a provision which deals with procedure as it leaves matters of evidence within the catch of Act 56 and FMS Cap 6;

— that s 8(3) is consistent with para 16(2)(f) of the Scheme Relating To Mutual Assistance In Criminal Matters Within The Commonwealth (The Harare Scheme) as amended in 1999 and Commentary on the Scheme. Attention is drawn to the words in parenthesis in s 8(3) that is to say, 'subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593]' and also to the words 'Subject to… and any law relating to the admissibility of evidence', in s 42(1) of Act 621.

— that s 8(4) requires the trial court to have regard to two matters specified therein when assessing the weight, if any, to be attached to any evidence received after a ruling that it is admissible and has been admitted.

On Submission (b)

Counsel stated that Act 621 originated from:

(a) the United Nations Convention Against Transnational Organised Crime (2000) ("the Convention") and referred to, in particular, the following Articles namely:

Article 6(1) which states:

Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:… and;

Article 34(1) which states:

Each State Party shall take the necessary measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

to bring home the point that the convention was not proposed or meant to fundamentally change the domestic law of countries; rather, those obligations, if implemented by domestic legislation, will be subject to the fundamental principles of domestic law such as already in Act 56.

Counsel also referred to art 18 of the Convention which deals specifically with the topic of 'Mutual legal assistance' and in particular, to art 18(3)(a) and (h) to make the points that the taking or collection of evidence are, in the context of the present appeal, obligations thereunder which are consistent with s 3(a) and (b) and ss 8 and 9 of Act 621; and

(b) the Harare Scheme, and referred to para 16(2)(f) to make the point that it is consistent with s 8(3) of Act 621, in particular, with the words in parenthesis 'subject to the provisions of the Evidence Act 1950 (Act 56) and Criminal Procedure Code (Act 593)'. In terms of 'any special requirements of the law of the requesting country as to the manner of taking evidence relevant to its admissibility in that country' in art 16(2)(f), counsel identifies s 33 of Act 56 as such special requirements of law in Malaysia.

Counsel further referred to legislations of Singapore, Hong Kong, Australia, and New Zealand corresponding to Act 621 and in the case of Hong Kong, the full text of s 77F(1)(a)–(d) of its Evidence Ordinance (Cap 8) in support of his submission.

Concluding his submission, counsel stated that Act 621 is a new law and a special law, based on the Harare Scheme and that Act 56 is a specialised law.

Submission of DPP

On the same issue of law in (a) above the learned DPP submitted that:

(i) s 8 applied but not s 33;

(ii) s 8 was not subject to s 33; and

(iii) even if s 33 was applicable, Act 621, being a special legislation overrode s 33.

He prefaced his submission by stating that (II) and (III) were reasons of the High Court Judge which he adopted as part of his submission.

On Submission (I)

The DPP makes the following points:

— the appellant submits that s 33 applied; the High Court judge ruled that it was not applicable; and the respondent maintained that it was not applicable;

— that relying on the meaning of 'judicial proceeding' in *Quazi*'s case and in the context of obtaining evidence in Hong Kong, the proceeding in Hong Kong is not a 'judicial proceeding' within the meaning of that term in s 33 because under s 10(2) of the Mutual Legal Assistance In Criminal Matters Ordinance (Chap 525) Hong Kong, the element of adjudication is lacking;

— that evidence under s 33 refers to secondary evidence, 'secondary' in the sense that such evidence is used for the second time as eg, in *Cheah Boon Tat*

v Public Prosecutor [1995] 2 MLJ 614 (CA), and not in the sense of secondary evidence as opposed to primary evidence as in *Dato' Yap Peng*'s case. He submits that in the latter case, Mokhtar Sidin J is wrong because he:

— assumes that s 33 applied;

— does not attempt to find out the meaning of 'judicial proceeding';

— does not appreciate that the evidence was not used in proceedings in Australia. Evidence in that case does not belong to the same class of evidence as envisaged in s 33;

— is not very sure of his law- is doubtful, as the word 'assuming' at p 353H seems to imply;

— hence, the ruling of the court in *Dato' Yap Peng*'s case at p 350 I is wrong.

— that *Dato' Yap Peng*'s case is irrelevant to the present appeal because firstly, it was decided before Act 621 was enacted; and secondly, s 33 is irrelevant for the purposes of evidence gathered pursuant to s 8(1) of Act 621.

On Submissions II and III

The DPP makes the following points:

— that if this court is of the view that s 33 is applicable in the present appeal, then no evidence under s 8 can be admitted, meaning that the construction of this court will defeat the object and purpose of Act 621;

— the consequence is that this court has no alternative but to hold that Act 621 is a special legislation, specifically enacted to deal, to admit evidence collected from foreign jurisdiction;

— in the event that s 8(3) is in conflict with any provision of Act 56, then Act 621 must prevail being a later law and a special law.

COMMON GROUNDS AND DISPUTED AREAS

[19] There is common ground that s 8 applies with reference to the Hong Kong evidence. There is also common ground that, independently of s 8(3) of Act 621, s 33 of Act 56 per se is not applicable to the Hong Kong evidence. However, the appellant argues that read in harmony with s 8, s 33 is applicable. The respondent maintains that s 8 and s 33 are unrelated and separate and by implication there is no way they can be read together. But if they can be read together, s 8 overrides s 33 so that s 33 is rendered inapplicable.

ISSUES OF LAW

[20] Thus the main question for determination in this appeal is not whether the Hong Kong evidence is admissible or not. Rather, the controversy is one of construction namely:

A (a) whether the phrase 'subject to the provisions of the Evidence Act (Act 56) and the Criminal Procedure Code (Act 593)' in s 8(3) are superfluous and should be ignored as the DPP submits; or

(b) whether s 8(3) and s 33 can be read in harmony as counsel for the appellant maintains.

B Attention is thus focussed on the words 'may' and 'subject to the provisions of the Evidence Act [Act 56] and the Criminal Procedure Code (Act 593)' in s 8, their construction and what Parliament means by these words.

[21] The position of the law in Malaysia as at 4 March 1991 pertaining to the C admissibility of deposition evidence obtained abroad from material witnesses for use in criminal proceedings in Malaysia in the absence of such witnesses, is as stated by the late Tun Dr Mohamad Suffian, former Lord President of the Federal Court of Malaysia which is recorded in the judgment of the High Court in Hong Kong in *Crown Solicitor v Kitingan* [1995] 1 LRC 634 at p 654 thus:

D Abuse of process

The only evidence of abuse of process was an affirmation on behalf of Dr Jeffrey Kitingan by Judge Suffian, distinguished jurist who was Lord President of the Federal Court of Malaysia from 1974–1982 and Chief Justice of the High Court of Malaya from 1973–1974. Judge Suffian is now the Vice-President of the International Labour Organisation, E Administrative Tribunal, Geneva and a judge of a similar tribunal of the World Bank in Washington D.C.

In his affirmation of 4 March 1991 Judge Suffian has explained the relevant law relating to the admissibility of deposition evidence by absent witnesses in criminal proceedings in Malaysia. As there is no provision of Malaysian law specifically dealing with the admissibility F of depositions obtained abroad, he has invoked the provisions of the Criminal Procedure Code FMS and the Evidence Act 1950 to determine whether the depositions requested are admissible. After consideration of the law of Malaysia, he states that the depositions to be taken in Hong Kong pursuant to the letter of request do not fall within the provisions of the Code or the Act, and therefore, the depositions, if taken, cannot be given as evidence in a criminal trial in Malaysia. Judge Suffian further expressed his opinion that with regard G to the evidence of the two bank employees, there is no provision available to compel an officer of a bank in a foreign jurisdiction to produce any banker's books or to appear as a witness to prove the matters and transactions recorded in a foreign jurisdiction for it is ultra vires the Banker's Books Evidence Act 1949.

[22] The state of the law according to the expert opinion evidence of the late H Tun Mohamad Suffian quoted above, is respectfully accepted as an accurate statement of the law as at 4 March 91 and a good starting point for the discussion of the law on the particular topic of admissibility of evidence taken or obtained abroad for criminal proceedings in Malaysia. Since then, Parliament has enacted Act 621 which came into operation on 1 May 2003 (PU(B) 168/2003) and the Mutual I Assistance in Criminal Matters Regulations 2003 (the Regulations) made under s 44 of Act 621 which came into operation on 15 June 2003 (PU(A) 194/2003).

ACT 621

[23] Act 621 is a piece of domestic legislation enacted by Parliament to implement those agreements of the Harare Scheme which the Malaysian Government undertook. It is essentially an enabling Act which empowers the AG to do the needful and the Minister to issue any Ministerial Order or direction necessary to give effect to the objects set out in s 3 of the Act: see ss 8, 9, 13, 14, 15, 20, 22, 23, 27, 31, 35, 37, 39, 40 and 43 (AG); 17, 18, and 44 (the Minister).

[24] Section 8 of Act 621

> 8 Request for taking of evidence, etc.
>
> (1) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any evidence would be relevant to any criminal proceedings in Malaysia, request the appropriate authority of a foreign state to arrange for:
>
> (a) such evidence to be taken in the foreign state;
>
> (b) the evidence to be sent to him.
>
> (2) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any thing would be relevant to a criminal matter in Malaysia, request the appropriate authority of a foreign state:
>
> (a) to assist in obtaining, by search and seizure if necessary, such thing in the foreign state or a photograph or copy of the thing; and
>
> (b) to arrange for the thing or the photograph or copy of the thing to be sent to him.
>
> (3) Any evidence or thing or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1980 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence at any criminal proceedings to which the request relates.
>
> (4) In assessing the weight, if any, to be attached to any evidence received by the Attorney General pursuant to a request made under subsection (1) which has been admitted as evidence in any criminal proceedings to which the request relates, the court shall have regard to:
>
> (a) whether it was possible to challenge the evidence taken; and
>
> (b) whether the law of the foreign state concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was being taken.

[25] Subsection (3) of s 8 talks of evidence to be admitted and sub-s. (4) of the weight to be attached thereto once admitted and both these in the context of any criminal proceedings. It is commonplace that these procedures go hand in hand and are built in to our judicial process. The forum which administers these procedures is no other than the court of first instance exercising criminal jurisdiction under Act 593. The reason for stating what must seem routine and trite is that although s 8(3) is silent as to the forum by which such evidence is to be admitted, it should be unequivocally clear from the term "court" in s 8(4) and beyond dispute that that

forum is the court of first instance and no other, lest such power to admit evidence under s 8(3) be mistaken for, mixed up with or confused with the powers of the AG as the powers of the latter and the powers of the court are contained in one s 8 instead of separately.

[26] The subject matter of s 8(3) consists of any evidence or thing, or photograph or copy of a thing taken in a foreign State and their admissibility as evidence in criminal proceedings in Malaysia. It is noteworthy that the term 'evidence' occurs twice in s 8(3); initially, in the context of any evidence etc… received by the AG pursuant to s 8(1) and (2) and latterly, in the context of evidence that may, subject to the provisions of Act 56 and Act 593 be admitted as evidence. Although used in one and the same subsection, it is plain and obvious that the meaning of that term is not the same arising from its use in different contexts. 'evidence' in the context of the first use embraces both transcripts of evidence recorded of witnesses that is to say, deposition, and affidavit evidence in Form 1 of the Regulations taken from deponents in a foreign State which is requested for, sent to, and received by the AG pursuant to s 8(1). 'evidence' in the context of the second use refers to admissible evidence having regard to the provisions of Act 56 and Act 593 with reference to criminal proceedings in Malaysia.

[27] 'evidence' in s 8(3) thus has within its ambit, two kinds of evidence taken in a foreign State that is to say, transcripts of evidence recorded of witnesses and affidavit evidence, for use in criminal proceedings in Malaysia. Affidavit evidence regardless of where it is taken, is outside the scope of Act 56: s 2 of Act 56. Its reception in a criminal court in Malaysia is subject to the provisions of s 424 of Act 593.

[28] 'thing' in s 8(3) is interpreted in s 2(1) of Act 621 to include material and the interpretation of 'material' therein includes any book, document or other record in any form, and any container or article relating to it.

[29] 'criminal proceedings' in s 8 is interpreted in s 2(1) to mean a trial of a person for a serious offence or a foreign serious offence, as the case may be, and includes any proceeding to determine whether a particular person should be tried for the offence.

[30] ID 157 consists of transcripts of witnesses' evidence by the Magistrate Court in Hong Kong (ie a deposition) for use in criminal proceeding in Malaysia. As stated before, it is common ground that ID. 157 would have been inadmissible evidence under s 33 of Act 56 standing alone. The particular issue is whether it is admissible evidence under s 8(3) read with s 33. This is an issue of law solely appropriate for the court of first instance to rule and it has made a ruling rightly or wrongly. As the trial is ongoing and is not yet concluded, obviously it would be most indiscreet, inopportune and indeed an extremely delicate, if not awkward, moment for this court to discuss the rights and wrongs of such ruling and to come to a holding one way or the other on the particular issue mindful of the binding effect of any such holding of this court upon the trial court. For this reason, nothing else would be said about the ruling hereafter.

[31] Section 8(3) makes express reference to the provisions of Act 56 and also to the provisions of Act 593 and uses the words 'may, subject to' these provisions 'be admitted as evidence…'.

[32] It is essential to pay careful attention to the language used by the Legislature in s 8(3) for as the Federal Court said in *Public Prosecutor v Chew Siew Luan* [1982] 1 MLJ 280 per Raja Azlan Shah CJ (Malaya) as he then was (at p 120):

> …, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear.

and again in *Public Prosecutor v Chu Beow Hin* [1982] 1 MLJ 135 (FC) at p 136D per Raja Azlan Shah Ag LP as he then was:

> The first task of the court is to find out the intention of Parliament and the words of a statute speak the intention of Parliament. 'And in so doing it must bear in mind that its function is jus dicere, not jus dare; the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament' (*Maxwell on Interpretation of Statutes*, 12th Ed Pp. 1, 2).

Structurally, s 8(3) contains three provisions:

- a provision that any evidence or thing or photograph or copy of a thing obtained by the AG pursuant to a request under s 8(1) and (2) may be admitted (by the trial court and not by the AG) as evidence at any criminal proceedings to which the request relate (the first provision);

- a provision that the first provision is subject to the provisions of Act 56 (the second provision); and

- a provision that the first provision is also subject to the provisions of Act 593 (the third provision).

[33] The first provision is cast in terms of 'may… be admitted as evidence' and not 'shall… be admitted as evidence' and the second provision and the third provision, cast in terms of 'subject to the provisions of the Evidence Act [Act 56] and the Criminal Procedure Code [Act 593] and not 'notwithstanding the provisions of the Evidence Act [Act 56] and the Criminal Procedure Code [Act 593].'

[34] 'may' in s 8(3) does not stand alone but is followed immediately by the words in parenthesis that is to say, 'subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence'. In that setting, 'may' does not depend on its abstract meaning of 'empowering'; it must be construed in its particular context as the majority judges said in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* [1970–1971] 127 CLR 106 (HC) per Windeyer J at p 134:

> The question, which comes back to the words 'may allow,' is not to be solved by concentrating on the word 'may' apart from its context. Still less is the question answered by saying that 'may' here means 'shall', While Parliament uses the English language the word 'may' in a statute means may. Used of a person having an official position, it is a word of

permission, an authority to do something which otherwise he could not lawfully do. If the scope of the permission be not circumscribed by context or circumstances it enables the doing, or abstaining from doing, at discretion, of the thing so authorised. But the discretion must be exercised bona fide, having regard to the policy and purpose of the statute conferring the authority and the duties of the officer to whom it was given: it may not be exercised for the promotion of some end foreign to that policy and purpose or those duties. However, that general proposition is irrelevant in this case. Here the scope of the permission or power given is circumscribed. Conditions precedent for its exercise are specified as alternatives. The question then is, must the permitted power be exercised if one of those conditions be fulfilled?

This does not depend on the abstract meaning of the word "may" but of whether the particular context of words and circumstance make it not only an empowering word but indicate circumstances in which the power is to be exercised — so that in those events the 'may' becomes a 'must.' Illustrative cases go back to 1663:… But I select one other reference out of a multitude: Macdougall v. Paterson (4). There Jervis CJ said in the course of the argument (5) 'The word 'may' is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise.' And, giving judgment, he said (1):

> We are of opinion that the word 'may' is not used to give a discretion, but to confer a power upon the court and judges; and that the exercise of such power depends, not upon the discretion of the court or judge, but upon the proof of the particular case out of which such power arises.

And per Owen J at p 138:

> The words 'may allow' are permissive; they empower the Commissioner to do that which he could not otherwise do. But when regard is had to the fact that the sub-section contains par. ©, I am of opinion that, notwithstanding the difference between the wording of s 46(2) and that of s 46(3), the Commissioner is bound to exercise the power given to him by s 46(3) if he is satisfied that the requirements of any one of the three paragraphs are satisfied. The relevant principles are set out in the joint judgment of this Court in *Ward v Williams*(1). There it was held that:
>
> > … it is necessary to bear steadily in mind that it is the real intention of the legislature that must be ascertained and that in ascertaining it you begin with the prima facie presumption that permissive or facultative expressions operate according to their natural meaning. 'The authorities clearly indicate that it lies on those who assert that the word 'may' has a compulsory meaning to show, as a matter of construction of the Act, taken as a whole, that the word was intended to have such a meaning' — per Cussen J: *Re Gleeson*(2). 'The meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from particular provisions, or from the general scope and objects, of the enactment conferring the power' — per Lord Selborne *Julius v Bishop of Oxford*(1). One situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the officer on whom it is conferred is described by Lord Cairns in his speech in the same case. His Lordship spoke of certain cases and said of them '[they] appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out and with regard to whom a definition is supplied by

> the legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised'.
>
> Section 46(3) does, I think, give rise to a situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the officer on whom it is conferred" and I am therefore of opinion that the appeal should be allowed.

[35] Applying the contextual approach as the learned majority judges of the High Court of Australia in the Finance Facilities (ibid) which I respectfully accept as appropriate and meaningful to the construction of s 8(3), I am of the view that "may" in the first provision is not discretionary but permissive or facultative and that such permission, power or authority to admit any deposition taken abroad as evidence and to include the same to form part of the record of proceedings of the trial court is deposited with that court and further, that the scope of the permission power or authority is circumscribed by the second provision and by the third provision that is to say, by the provisions of Act 56 and Act 593. The particular query here is which provision(s) of Act 56 and Act 593 circumscribe the scope.

[36] Counsel for the appellant identifies s 33 of Act 56 as the provision which comes nearest to s 8(3). The DPP, on the other hand, says that s 33 is irrelevant and that s 8(3) is not subject to s 33.

SECTION 33 OF ACT 56 AND S 272A OF ACT 593

[37] Section 33 so far as is relevant to the facts and background outlined above reads thus:

> Evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving… or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:
>
> Provided that:
>
> (a) the proceeding was between the same parties or their representatives in interest;
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;
>
> (c) the questions in issue were substantially the same in the first as in the second proceeding.

[38] The first point to ask here is what is meant by the opening words of s 33 namely, 'Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it. '… In my view, these words express in brief the meaning of the legal term 'deposition' in the light of its purported admission as evidence in a subsequent judicial proceeding or in a later stage of the same judicial proceeding to prove the truth of the facts that it states: see *Osborn's Concise Law Dictionary*, (8th Ed) p 112 'deposition'. Having regard to the provision of s 2 of Act 56, these words are referable exclusively to deposition of absent witnesses recorded in deposition hearing or judicial proceeding held within Malaysia.

[39] 'judicial proceeding" is defined in s 2 of Act 593 to mean 'any proceeding in the course of which evidence is or may be legally taken'. The expression 'Judicial Proceeding" includes a proceeding before any court, tribunal, or person having by law power to hear, receive, and examine evidence on oath: *Mallal's Criminal Procedure* (4th Ed) p 12. The recording of evidence in a trial is a criminal procedure matter — not an evidence matter — and the manner of recording of evidence is provided for in s 267 of Act 593. Further by s 272A of Act 593, another person may be authorised by the judge or Magistrate to take down notes of evidence of witnesses. From the word 'deposes' in s 272A, it is derived that the notes of evidence so taken by the authorized judge or Magistrate is a deposition and the hearing before him, a deposition hearing. A deposition hearing is thus a 'judicial proceeding" within the extended meaning given in *Mallal* and with reference to the explanation given in s 33 itself.

[40] However, s 33 of Act 56 specifies the circumstances and stipulates the essential conditions to be established before the deposition can be admitted by the trial court as relevant evidence and included to form part of the record of the trial court in terms of s 272A of Act 593. These circumstances must be strictly proved before the deposition can be admitted: *Kee Siak Kooi Anor v Regina* [1955] 2 MLJ 57 (CA) And they are that at the time of the trial:

(1) that the witness is dead or cannot be found or is incapable of giving evidence, or

(2) is kept out of the way by the adverse party, or

(3) if his presence cannot be obtained without an amount of delay or expense which under the circumstances the court considers unreasonable.

If there is no evidence to establish any of these circumstances and the deposition is admitted, it has been held to have been wrongly admitted: *Kee Siak Kooi*. The conditions stipulated by the proviso to s 33 must also be fulfilled. If there is evidence to establish any of these circumstances and the conditions are satisfied then the deposition becomes relevant and is rightly admitted as evidence and included to form part of the record of the same judicial proceeding (that is to say, of the identified criminal trial) or of a subsequent judicial proceeding as the case may be, by operation of s 272A of Act 593 which provides thus:

> 272A. Nothing in this chapter shall prevent a Judge or Magistrate in an inquiry or trial causing verbatim notes to be taken by another person of what each witness deposes in addition to any note of a substance thereof which may be made or taken by the Judge or Magistrate himself, and such note shall form part of the record.

The legal corollary of this is that the deposition hearing before the authorized judge or magistrate is not a trial by itself; it is a process of gathering evidence which forms an integral part of the hearing of the identified criminal trial or of a subsequent judicial proceeding.

[41] To sum up, s 272A of Act 593 and s 33 of Act 56 deal with a subject or topic in common namely, deposition obtained locally within Malaysia; its authorization

and inclusion to form part of the record of the identified criminal trial as a strictly criminal procedure matter on the one hand, and its relevancy and admission as evidence of the truth of the facts which it states as a strictly evidence matter on the other hand.

SECTION 8(1) AND (3), SS 272A AND 424, AND S 33 — INTERRELATIONSHIP AND EFFECT

[42] Section 8(3) of Act 621 deals with the same subject or topic namely, deposition but with a difference that such deposition is obtained abroad and from overseas witness(es) instead of locally within Malaysia and further that it is requested by the AG who is authorised by Parliament by s 8(1) of Act 621 instead of the trial judge under s 272A of Act 593. In addition, evidence by way of deposition in s 8(3) includes affidavit obtained abroad for use in criminal proceedings in Malaysia which are receivable under s 424 of Act 593 as stated earlier in this judgment. Except for these differences, s 8(1) and (3), s 33 and s 272A deal with a subject or topic in common namely, deposition and the issue is also in common namely, its admission as evidence from the law of evidence aspect and its inclusion to form part of the record of the criminal trial from the criminal procedure aspect. Like the taking of evidence by another person authorised by the trial judge or Magistrate under s 272A, the taking of evidence by a foreign court at the request of the AG pursuant to s 8(1)(a), is a process of gathering evidence and is not a trial: see *R v Secretary of State for the Home Department ex parte Zardari* (unreported. CO/0345/98 11 March 1998 QBD). There is much in common between them and they can be said to correspond to one another in that they provide for parallel situations, the problems of making witnesses, local and foreign, available at the criminal trial to testify and the legal issues envisaged, seem not dissimilar. Thus to my mind, s 33 is most relevant to s 8(3) and on this score, with respect, I differ from the DPP and agree with counsel for the appellant. However, s 33 and s 272A are limited in its application to admission by the court of deposition taken locally. There is no counterpart provision in Act 56 or Act 593 to enable the court to admit deposition obtained abroad as evidence or to include it to form part of the record of a criminal trial and as a result it would be excluded on the ground that it is inadmissible evidence thereunder. This would seem to accord with the findings expressed by the late Tun Suffian in his expert opinion quoted above.

[43] The DPP, however contends that there is specific provision in s 8(3). And when pointed out by me that s 8(3) expressly states 'subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593]', his reply is that these words are superfluous. As I understand his argument, the only words in s 8(3) which matter to him are:

> Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may,… be admitted as evidence at any criminal proceedings to which the request relates.

It will be recalled that these words constitute the first provision in s 8(3) identified earlier in this judgment upon a structural breakdown of the entire provisions of s 8(3). If I understand him correctly, the meaning of the first provision is that the trial

court shall admit the deposition so obtained; otherwise, the object of Act 621 listed in s 3(a) namely obtaining of evidence and things would be defeated. The first provision, he argues, is a specific provision. It is apparent that that line of argument is focussed on the construction and meaning of the word 'may' in s 8(3) and that he reads 'may' there to mean shall, that is to say, obligatory on the trial court to admit the deposition as evidence. The remainder words of s 8(3) namely, 'subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593]' which constitute the second provision and the third provision in s 8(3) as earlier identified, do not matter to him and according to him are superfluous. By this, I understand him to mean that the second provision and the third provision add nothing to the meaning of the first provision and that they can be ignored as surplus words.

[44] The DPP has cited no case law authority to support this line of argument. The words of a statute speak the intention of Parliament. And in so doing the court must bear in mind that its function is jus dicere, not jus dare; the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament so says the Federal Court in *Chu Beow Hin* quoted above. The first provision of s 8(3) cannot be taken out of context, isolated, and the second provision and the third provision ignored and excised from s 8(3) and then label it a specific provision. The first provision must be construed in the particular contexts of the second provision and of the third provision of s 8(3) following the High Court of Australia in *Finance Facilities*. This approach conforms to the sound and well-known principle of construction of statute acknowledged by the Federal Court in *Chew Siew Luan* quoted above namely, that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear.

[45] As I understand it, the phrase 'subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593]' in s 8(3) applies, by way of application, the provisions of Act 56 and Act 593 to the first provision with a qualification, that is to say, so far as the first provision is not inconsistent with the provisions of Act 56 and Act 593. To my mind, the phrase expresses in legal language the unambiguous intention of Parliament that the admission of deposition obtained abroad and its inclusion to form part of the record of proceeding in the trial court are based on the same principles as those for the admission and inclusion of deposition obtained locally which are presently enacted in s 33 and s 272A. Thus, here again I agree with the submission of counsel for the appellant that s 8(3) is consistent with para 16(2)(f) of The Harare Scheme and would add that in broad terms s 8(3) is a legislative measure which Parliament has taken to implement the agreement in para 16(2)(f) which the Malaysian Government undertook at the meeting. If the intention is as the DPP contended, Parliament would no doubt have expressed its intention in clear legal language that is to say, 'shall, notwithstanding the provisions of etc…' or words to the like effect. For comparision, contrast and note the difference in stiffness of the language used by Parliament in eg, s 73 of the

Anti-Money Laundering Act 2001 (Act 613) in the matter of admissibility of statements (not depositions) by persons to an officer of an enforcement agency in the course of investigation. Consequently, I find no merit in this argument of the DPP. A

[46] Carrying his argument further in the event that this court does not accept his submission, the DPP says that the first provision is a specific provision, a special law and a later law and if s 8(3) is in conflict with any provision of Act 56, then Act 621 must prevail because it is a special law and a later law. B

[47] Two points of law arise from his further argument namely:

(a) whether s 8(3) is a specific provision and Act 621, a special law; and C

(b) where is the conflict between the provisions of s 8(3) and s 33.

[48] It has been pointed out before that 'evidence' in the context of the first use in s 8(3) consists of deposition abroad taken in a judicial proceeding and also of deposition abroad by way of affidavit, the admission whereof is permissible by the first provision subject to the second provision and again by the first provision subject to the third provision. With reference to point (a), s 8(3) can hardly be called a specific provision (in the sense that a specific provision deals with a particular topic or subject only) as it deals with two types of deposition, the admissibility or admission whereof falls to be determined by reference to two different Codes namely, Act 56 and Act 593 respectively. It is not a specific provision in terms of what the late Tun Suffian meant in the excerpt from *Kitingan* quoted above. Further, although locating and identifying witnesses, arranging for them to give evidence and obtaining evidence and things abroad are expressly listed as among the primary objects for which international assistance is sought in criminal matters, authority of the court to admit evidence thus obtained and to include it to form part of the record of the trial court at home are obviously not. There is no reference to the court specifically in s 8(3) — not even in the shoulder note thereto. The reader has to 'read in' a reference to the court by necessary implication. The language of s 8(3) is subservient and the entire provision seemingly consequential, inlaid (as it were) inconspicuously with the powers of the AG — and obviously not regarded worthy to occupy pride of place in a separate section of its own as befitting a specific provision. And so be it. As is said before, s 8(3) as it is, and not what it ought to be or to have been, is a permissive provision and it may be added here, generally permissive of the reception of both types of depositions abroad and is not a specific provision. D E F G

[49] Act 621 has as its source, the Harare Scheme, the professed purpose of which is to increase the level and scope of assistance rendered between Commonwealth Governments in criminal matters. H

[50] The preamble to Act 621 states that it is an Act to make provision for mutual assistance in criminal matters between Malaysia and other countries and for matters connected therewith. I

[51] The short title of Act 621 is the Mutual Assistance in Criminal Matters Act 2002.

[52] Section 3 of Act 621 declares its object which is for Malaysia to provide and obtain international assistance in criminal matters, including:

(a) providing and obtaining of evidence and things;

(b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;

(c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;

(d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence;

(e) the execution of requests for search and seizure;

(f) the location and identification of witnesses and suspects;

(g) the service of process;

(h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;

(i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and

(j) the examination of things and premises.

[53] Section 4 declares that Act 621 does not prevent the provision or obtaining of international assistance in criminal matters to or from Interpol or any other international organisation, to or from any foreign State. Subsection (3) declares that Act 621 does not prevent the provision or obtaining of international assistance in criminal matters under any other written law.

[54] Lastly, s 5 declares that Act 621 is not authority for the extradition of any person.

[55] In my view the several declarations in ss 4 and 5, in particular, s 4(3) put beyond doubt that Act 621 is not a special law vis-a-vis any other written law and I conclude accordingly. The theme words in the Harare Scheme and Act 621 are 'co-operation' and 'assistance', not 'obligation' as in a Treaty or a Convention. The scope of co-operation under Act 621 is confined exclusively to States in the Commonwealth and that too is on a mutual basis.

[56] With reference to point (b), in as much as s 8(3) expressed in legal language ie, 'subject to' and not 'notwithstanding' the provisions of Act 56 and Act 593, this means that the first provision, vis-a-vis the second provision and the third provision, is the subordinate provision. The second provision and the third provision are the dominant or leading or master provisions vis-a-vis the first provision of s 8(3). This indicates that the first provision is qualified by the second provision and the third provision and also that the second provision and the third provision are to

prevail over the first provision in the event of conflict and not the reverse as the DPP contends. Thus, in *Clark (C & J) Ltd v IRC* [1973] 1 WLR 905 (Ch D) at p 911 Megarry J elucidates:

> In my judgment, the phrase 'subject to' is a simple provision which merely subjects the provisions of the subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision.

It is implicit from this excerpt that the subordinate provision and the dominant provisions must be consistent or reconcilable in order for them to apply: see also on this point *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 28 MLJ 169 (PC) at p 171 per Lord Denning. If they are consistent, the phrase 'subject to' does nothing, it lies silently by: see *Clark (C & J) Ltd* at p 912 B. If they are inconsistent and genuinely irreconcilable (ie, there is a clash) the subordinate provision must yield and the dominant provisions, prevail.

[57] Before us, apart from mentioning in general where there is a conflict, the DPP has not actually identified which particular provision of s 33 is in conflict with the provision of s 8(3). In appeal record (Jld. 2) at p. 8 para 5, the DPP states in his Outline Submission to the High Court that s 8 MACMA and s 33 deal with different situations and that there is no conflict; and further, if there is, the statutes/provisions must be construed harmoniously so as not to render one of them repugnant. So far as can be discerned, there is no inconsistency or conflict between the provisions of these two sections. The first provision of s 8(3) and s 33 are permissive or facultative provisions. The latter however, has made detailed provisions for the circumstances and conditions pertaining to admissibility, but not the former. There is thus no possibility of any inconsistency or clash between them. Consequently, reliance on the Latin maxim: generalia specialibus non derogrant and *Godwin v Phillips* (ibid) or specialia derogrant generalibus for that matter is irrelevant and of no assistance to the DPP.

[58] Section 33 is a provision of Act 56. As earlier stated, it has no application to deposition obtained abroad which, by s 2, falls outside the scope of Act 56. However, s 33 is rendered applicable to such deposition by way of application that is to say, via the first provision and the second provision of s 8(3) thereby treating such deposition on an equal footing as a deposition obtained locally within Malaysia and subject to the same principles of admissibility set out in s 33, and not as a special law as the DPP submitted.

[59] By the provisoes (a), (b) and (c) thereto, s 33 stipulates the conditions precedent all of which must be fulfilled and by prescribing the circumstances in the enacting section of s 33, the existence of any one of which (if proven) is enough to qualify the deposition abroad to be relevant and admissible evidence. These circumstances, if proven, will result in the dispensation of witness(es) and admission of the deposition as evidence of the truth of the facts which it states, contrary to the oral evidence rule required under s 60(1) and (3) and the competency

A and compellability of witness(es) rule in s 118 of Act 56. In short, the circumstances set out in s 33 appear to be countervailing circumstances against those implicit in s 60 and s 118 of Act 56.

B **[60]** Assuming without deciding that all the conditions precedent are fulfilled and one, at least, of the circumstances is proven - the decision whereof is appropriately a matter for the trial court and no other - the second provision operates on the first provision of s 8(3) in like manner just described of the admission under s 33 of a deposition obtained locally.

C **[61]** The result is a dispensation of the overseas witness(es) who otherwise will be required under s. 60(1) and (3) and s. 118 of Act 56 to attend at the trial in person to give oral evidence. In their stead, the deposition obtained abroad from them will be admitted or received by the trial court as evidence of the truth of the facts stated therein.

D

[62] In short, the effect of the second provision upon the first provision is that the exercise of the general power, permission or authority of the trial court under the first provision is "circumscribed" by the second provision of s 8(3) of Act 56, to use the word of Windeyer J in Finance Facilities (ibid)at p 134. (that is to say, by the E conditions and circumstances stipulated in s 33). In legal language, "may" be admitted in the first provision thus become "must" be admitted following the approach to construction of the High Court of Australia in Finance Facilities (ibid) and the trial court is duty bound to exercise the general power, permission or authority thereunder. If the conditions and circumstances in s 33 are not met, F the general power, permission or authority in s 8(c) remains with the trial court as a "potential" to use the word of Cussen J in Re Gleeson [1907] VLR 368 at p 373 quoted by Owen J in Finance Facilities (ibid) at p 138. It is not exercised: "may" be admitted remains as it is, not "must" be admitted.

G **[63]** Like s 33 of Act 56, s 272A of Act 593 applies only to deposition taken locally in Malaysia for inclusion to form part of the record of the trial court. By itself, it has no application to deposition taken abroad. Like s 33, s 272A is rendered applicable to deposition taken abroad by application via the first provision subject to the third provision of s 8(3) of Act 621.

H

[64] In the event that the deposition taken abroad is ruled inadmissible, no question arises for its inclusion to form part of the trial record. However, where the trial court ruled that it is admissible and such deposition is duly authenticated as required by s 42 of Act 621, it is deemed to be admissible in the identified criminal trial and by operation of s 272A read with s 8(3) is included to form part of the I record of the trial court. Authentication of documents is a procedure matter: *Ex p Kirby* [1979] 1 WLR 541 at p 544; p 545G per Croom-Johnson J; *Oskar v Government of Australia* [1988] 87 Cr App R 299 at p 308; and *Set Kon Kim v Officer in Charge, Cheras Police Station* [1984] 1 MLJ 73, third holding and at p 75 per Mohamed Dzaiddin J (as he then was).

[65] Thus on the main question set out in (a) and (b) earlier for determination in this appeal, I conclude that s 8(3) and s 33 can be read in harmony and should be so read as counsel for the appellant maintained. So read, they are intelligible, meaningful and workable and should be allowed to work together as all three Acts namely, Act 621, Act 56 and Act 593 are Acts passed by Parliament. The phrase 'subject to the provisions of the Evidence Act (Act 56) and the Criminal Procedure Code (Act 593)' in s 8(3) is not superfluous and is not to be ignored.

BANKERS' BOOKS (EVIDENCE) ACT 1949 (ACT 33)

[66] As regards (Act 33) touched upon very briefly by counsel for the appellant in his submission to which there has been no response by the DPP, suffice for me to state here that I respectfully accept the expert opinion of the late Tun Mohamad Suffian in the excerpt quoted above from *Kitingan* as a correct statement of the law which holds good even to this day. There has been no changes to Act 33 since 4 March 1991. However, it is open to the AG to have recourse to the provisions of s 9 of Act 621 if he is so minded.

THE MATTER OF REVISION

[67] Having perused his ruling as a whole and in the light of what is said above, in my assessment, the learned trial judge is not mistaken in his appreciation of the relationship between s 33 of Act 56, s 272A of Act 593, s 8(3) and s 42 of Act 621 and appears to have a good working knowledge of their application and effect in practice in the context of a criminal trial.

[68] He is duty bound to rule the Hong Kong evidence in or out as the case may be, which he has done so with reasons. Such a ruling is procedural in nature and is not final. It is open to him to reconsider his ruling at any time and parties thereto have no right of appeal against such ruling while the trial is still in progress. For the same reason, criminal revision is premature and inappropriate at this juncture. For now, parties must abide by the ruling of the court. As it stands, there is nothing seriously amiss with the ruling. Even if there is, it is open to the aggrieved party to appeal to the High Court once judgment has been pronounced in open court below on the case as a whole.

[69] Until then, the trial judge must be left alone to continue with the trial smoothly to its conclusion.

CONCLUSION

[70] For the reasons stated, I allowed the appeal; set aside the revisionary order of the High Court dated 29 April 2005; restored the ruling dated 26 April 2005 of the session court and remitted the case to it for continuation of the trial to its conclusion.

Abdul Aziz Mohamad JCA:

[71] During the trial of the appellant in the Sessions Court in Kuala Lumpur on a principal charge and an alternative charge of criminal breach of trust, an offence

punishable under s 409 of the Penal Code, the learned sessions court judge rejected the public prosecutor's application for the admission as evidence under sub-s (3) of s 8 of the Mutual Assistance In Criminal Matters Act 2002 ('the MACMA') of certain evidence taken in Hong Kong by a magistrate of Hong Kong pursuant to the attorney general's request under sub-s (1) of that section, which the attorney general was satisfied would be relevant to the trial of the appellant. The evidence consisted essentially of the transcripts of the evidence of six witnesses and of documents produced by one of the witnesses. In the taking of the evidence, the attorney general conducted the examination-in-chief of the witnesses and the appellant's counsel conducted their cross-examination.

[72] On the application of the Attorney General to the High Court, the learned judge, after hearing submissions from both sides, exercised his powers of revision under s 323 of the Criminal Procedure Code and ordered that the evidence taken in Hong Kong be admitted as evidence in the trial of the appellant. By a majority decision (Denis Ong JCA dissenting), this court dismissed the appellant's appeal.

[73] Section 8 of the MACMA states as follows:

> (1) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any evidence would be relevant to any criminal proceedings in Malaysia, request the appropriate authority of a foreign State to arrange for:
>
> (a) such evidence to be taken in the foreign State; and
>
> (b) the evidence to be sent to him.
>
> (2) The Attorney General may, if he is satisfied that there are reasonable grounds for believing that any thing would be relevant to a criminal matter in Malaysia, request the appropriate authority of a foreign State:
>
> (a) to assist in obtaining, by search and seizure if necessary, such thing in the foreign State or a photograph or copy of the thing; and
>
> (b) to arrange for the thing or the photograph or copy of the thing to be sent to him.
>
> (3) Any evidence or thing, or photograph or copy of a thing, received by the Attorney General pursuant to a request under subsection (1) or (2) may, subject to the provisions of the Evidence Act 1950 [Act 56] and the Criminal Procedure Code [Act 593], be admitted as evidence at any criminal proceedings to which the request relates.
>
> (4) In assessing the weight, if any, to be attached to any evidence received by the Attorney General pursuant to a request made under subsection (1) which has been admitted as evidence in any criminal proceedings to which the request relates, the court shall have regard to:
>
> (a) whether it was possible to challenge the evidence taken;
>
> (b) whether the law of the foreign State concerned allowed the parties to the criminal proceedings to be legally represented when the evidence was being taken.

[74] It is clear from the section that its scheme is to enable evidence in the form of testimonies or things to be taken or obtained in a foreign State for the specific purpose of being used as evidence in criminal proceedings in Malaysia. Where testimonies are concerned, the evidence taken abroad may be used in criminal

proceedings in Malaysia instead of the persons concerned being present themselves to give evidence. Such evidence is rendered admissible by sub-s. (3), which, therefore, is an enactment of a new aspect of the law of evidence. Subsection (3), however, makes the admission of the evidence subject to the provisions of the Evidence Act 1950. It means, firstly, that if there is anything in that Act that renders the evidence or any part of it inadmissible, then the evidence or the particular part is not admissible. That does not extend to any requirement that a witness be present in person in court to give evidence, because to hold otherwise would defeat the purpose of s 8 completely. The question of excluding any evidence as inadmissible must be judged as if the witness were present and giving evidence in the trial court. If the evidence is, for example, hearsay evidence because it is an account of what someone else told him, then it is not admissible, unless it falls within any exception to the hearsay rule. But his evidence is not hearsay by reason only that his evidence is not given personally in the trial court. Secondly, the subjecting provision in sub-s (3) means that if there is any requirement in the Evidence Act 1950 that is to be fulfilled before the evidence taken under s 8 may be admitted, then the evidence may not be admitted if the requirement is not fulfilled. This is where the controversy that led to the appeal arose. The Sessions Court ruled that s 33 of the Evidence Act 1950 applies to the Hong Kong evidence and that the preconditions for admissibility laid down in the section had not been fulfilled. The High Court, on revision, held that s 33 does not apply to the Hong Kong evidence. The question, therefore, in the appeal was whether s 33 applies to the Hong Kong evidence.

[75] Section 33 is as follows:

> Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers unreasonable:
>
> Provided that:
>
> (a) the proceeding was between the same parties or their representatives in interest;
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;
>
> (c) the questions in issue were substantially the same in the first as in the second proceeding.
>
> Explanation — A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

At p 732 of *Sarkar's Law of Evidence* (15th Ed, 1999) the function of the section is summarized as follows:

> This section lays down the conditions under which secondary evidence of the testimony of a witness given in a former proceeding, civil or criminal, is rendered admissible in a subsequent proceeding or in a later stage of the same proceeding. It is based on the rule that the best evidence available must always be produced. Previous depositions of witnesses are therefore admissible in subsequent proceedings when the witnesses cannot be produced (eg, for death, incapability of giving evidence, & c) or when their production would involve unreasonable delay or expense. The question of their admissibility under this section

depends not as in s 32 on the intrinsic character of the statement and its subject-matter, but on the circumstances in which they were made. When it is wholly beyond the power of a party to produce a witness on account of his death or incapacity to give evidence or being kept out of the way by the other side or when his presence cannot be obtained without an unreasonable amount of delay or expense, his previous deposition is admissible in a subsequent judicial proceeding in proof of the facts stated therein, when all the following conditions are fulfilled:

and there follow the conditions in the proviso.

[76] In the appeal, Dato' Shafee for the appellant, contending that the section applies to the Hong Kong evidence, submitted that it is not admissible because there was no proof that the presence of the witnesses concerned 'cannot be obtained without an amount of delay or expense which under the circumstances of the case the court considers reasonable'.

[77] To me it was obvious that the scheme of s 8 of the MACMA is entirely different from the scheme of s 33 of the Evidence Act 1950 and that therefore any requirement for the admission of evidence under s 33 belongs exclusively to the scheme of s 33 and cannot extend so as to be a part of the scheme of s 8. Section 33 is a conservative provision for the admission as secondary evidence in a judicial proceeding of a witness's testimony that happens to already exist, having been given in some other judicial proceeding. The idea is that it would be a pity and a waste if that testimony cannot be used at all now in the present proceedings when it could assist the case of a party if it could be used. So s 33 lays down the circumstances under which the previous testimony can be used and the conditions that must exist for its use. The circumstances and conditions are strict and conservative, such as that it is now impossible or extremely difficult to secure the attendance of the witness to testify again and that, when he gave his testimony before, the adverse party in the present proceedings must have had the right and opportunity to cross-examine him. Section 8 of the MACMA, on the other hand, provides a scheme for the deliberate gathering in a foreign State of the testimonies of witnesses to be used specifically in a particular criminal proceedings in Malaysia, something which is clearly not within the contemplation of s 33. If a clear demonstration is needed that the requirements of s 33 cannot apply to evidence taken under s 8, it is provided by sub-s (4) of the latter section, which, in the light of para (a), would render the evidence nonetheless admissible, but subject to assessment as to weight, even though it has not been possible to cross-examine the witness, probably because the law of the foreign State concerned does not allow or provide for cross-examination. If s 33 applies to evidence taken under s 8, the evidence taken would not be admissible because one of the requirements for admissibility under s 33 is the right and opportunity to cross-examine, and that would conflict with sub-s (4) and frustrate the intention behind it, whereas it is an enactment of the law of evidence as to admissibility of evidence and, being a later enactment than s 33, must prevail.

[78] The problem in getting witnesses in a foreign State to testify in a criminal proceedings in Malaysia lies in the fact that they are outside our jurisdiction and are not amenable to our process to compel their attendance. The scheme of mutual assistance between Malaysia and other countries in the MACMA is to overcome the

problem by enabling Malaysia to seek the assistance of a foreign State. Apart from assistance by way of the taking of evidence under s 8, there is assistance by way of arranging for the attendance in Malaysia of a person in a foreign State. This is dealt with in s 9, which provides as follows:

(1) The Attorney General may request the appropriate authority of a foreign State to assist in arranging for the attendance in Malaysia of a person in the foreign State for the purpose of giving any evidence or assistance if he is satisfied that:

(a) there are reasonable grounds to believe that the person is capable of giving such evidence or assistance relevant to a criminal matter involving a serious offence; and

(b) the person consents to travel to Malaysia for the purpose of giving such evidence or assistance.

(2) The Attorney General may make arrangements with the appropriate authority of the foreign State for the purpose of the attendance of that person in Malaysia, his return to the foreign State and other relevant matters.

Resort to a request under s 9 may only be had where the criminal matter that requires the evidence or assistance of a foreign person is one involving a serious offence as defined in sub-s (1) of s 2 and the person consents to travel to Malaysia for the purpose of giving the evidence or assistance. Where the criminal matter does not involve a serious offence or the person does not consent, resort to s 9 cannot be had and there remains only the facility of taking evidence afforded by s 8. Subsection (2) of s 9 indicates that where a case qualifies under section 9, the attendance of the witness is expedited. There is no problem of expense or delay. So if s 33 were to apply to evidence taken under s 8 so as to require proof of delay or expense as a precondition for its admissibility, then in a case that does not involve a serious offence, or involves a serious offence but the witness does not consent to travel to Malaysia, evidence taken under s 8 cannot ever be admitted because it will be impossible to prove delay and expense, since delay and expense do not arise in point of fact and since the only reason for the need to have the evidence admitted is because s 9 does not enable arrangements to be made for the personal attendance of the witness. The result is that in such a case the evidence of the witness cannot be made available either through the taking of it under s 8 or through the presence of the witness by arrangement under s 9. Further, there is nothing in either s 8 or 9 to indicate that in a case involving a serious offence or where the witness consents to travel to Malaysia the Attorney General is bound to resort to s 9 and is precluded from resorting to s 8. Even where a serious offence is involved or where the witness consents to travel to Malaysia, there does not appear to be any bar to the Attorney General choosing to resort to s 8 by arranging to have the evidence of the witness taken in the foreign State for admission in criminal proceedings in Malaysia, but it will not be because obtaining the presence of the witness in Malaysia will involve expense or delay. If s 33 were to apply to the evidence taken under s 8, it will be impossible to prove expense and delay and the evidence cannot be admitted. The result of applying s 33 would be to frustrate the purpose of s 8. As I said, s 33 cannot apply because its scheme is different from that of s 8 and the scheme of s 8 is not within the contemplation of s 33

[79] The application of s 33 is to evidence given "in a judicial proceeding, or before any person authorized by law to take it". In the appeal there was some debate on the meaning of "judicial proceeding" because Dato' Yusof bin Zainal Abiden, who appeared for the Public Prosecutor, argued, as one of the reasons for contending that s 33 does not apply to the Hong Kong evidence, that the Hong Kong proceedings in which the evidence was taken were not a judicial proceeding while Dato' Shafee argued that they were a judicial proceeding. The words "a later stage of the same proceeding" were also examined and views were expressed as to what could have been envisaged to be a criminal proceeding in which evidence given in a stage of it is needed to be given at a later stage of it. Datuk Yusuf suggested the example of the now obsolete preliminary enquiry and the subsequent trial. Dato' Shafee contended that the taking of evidence in Hong Kong was an earlier stage of the same judicial proceedings, namely the trial in Kuala Lumpur. But I do not find it necessary to express an opinion on those questions because the reasons that I have given for saying that s 33 cannot apply to evidence taken under s 8 do not depend on whether or not the proceedings at which evidence is taken pursuant to s 8 are a judicial proceeding.

[80] A large part of Dato' Shafee's submission was devoted to the examination of certain provisions of the Harare Scheme Relating to Mutual Assistance in Criminal Matters, which provided the basis for the MACMA, and certain provisions of certain statutes of several other countries about mutual assistance in criminal matters or about the taking and use of foreign evidence. I do not propose to dwell on those provisions because ultimately the question of admissibility of the Hong Kong evidence has to be decided on an examination of s 8 of our MACMA and s 33 of our Evidence Act 1950. Dato' Shafee himself admitted that if only sub-s. (3) of s 8 had expressly excluded the application of s 33 he would raise his hands in surrender.

[81] Criticism was directed at certain aspects of the grounds of decision of the learned judge. But in essence his findings were that 's 33 of the Evidence Act has no application here', that the Hong Kong evidence 'does not require to pass the test and qualifications laid down in s 33 of the Evidence Act', that the MACMA 'has to be read as special in its effect', that 'To subject [the MACMA's] operation to the technical requirements as found under s 33 of the Evidence Act would render Parliament's intention of a speedy and convenient method of taking evidence overseas, as nugatory' and that 'MACMA, as a special legislation, must be deemed to override (s 33)'. Seen in the light of the reasons that I have set out, those findings were, to my mind, essentially correct.

[82] That brings me finally to a matter that rightly should be dealt with first but which in this case I feel it expedient to deal with after examining the question of substance in the appeal. The matter is a preliminary point raised by Dato' Shafee about the judge's jurisdiction to entertain the Public Prosecutor's application for revision. Dato' Shafee's point was that the powers of revision under s 323 of the Criminal Procedure Code 'are to be used sparingly only in cases where glaring patent errors are committed by the lower courts'. His stand was that if we found that the judge ought not to have exercised his revisionary powers under s 323, the order that he made should ipso facto be set aside. I do not need to dwell on the scope of the

powers under s 323 because even on the scope as contended for by Dato' Shafee I was of the view that the sessions court made a glaring patent error in rejecting the Hong Kong evidence and that therefore the High Court was right to act under s 323. Upon a mere reading of s 8 of the MACMA and of s 33 of the Evidence Act 1950 it became immediately apparent to me that s 33 could not apply to evidence taken under s 8. Unfortunately the judge did not say that such was his experience, but I was sure that that was his experience too. A person who sees a matter as obvious has sometimes, as I have done, a bit of work to do to explain why it is so, and a person who is unable or unwilling to see that it is so has naturally, as Dato' Shafee has done, to put in a lot of work to show otherwise, but the obvious remains obvious.

[83] These grounds of judgment have the concurrence of my learned brother Azmel Maamor JCA.

Order accordingly.

Reported by Loo Lai Mee